IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WHIRLPOOL CORPORATION	)	
	)	DOCKET NO. 2:15cv1528
-vs-	)	
	)	Marshall, Texas
	)	8:34 a.m.
TST WATER, LLC	)	March 10, 2017

TRANSCRIPT OF JURY TRIAL
ALL DAY
BEFORE THE HONORABLE RODNEY GILSTRAP,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

PLAINTIFFS:

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P R O C E E D I N G S

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

All right. Are the parties prepared to present those items from the list of pre-admitted exhibits used during yesterday's final portion of the trial?

You asked for time overnight to get that straightened out. I assume you have, Ms. DeRieux. Where is the Defendant on this?

MS. DERIEUX: We're ready, Your Honor.

THE COURT: Then let me have the Defendant's offering, and then I'll hear from Plaintiff.

MS. DERIEUX: During yesterday's proceedings the Defendant admitted Defendant's Exhibits 1, 3, 18, 22, 25, 26,

27, 28, 29, 100, 102, 214, 323, and 758.

THE COURT: All right. Is there objection of that offering from the Plaintiff?

MS. BARATH: No, Your Honor.

THE COURT: Does the Plaintiff have a similar rendition to read into the record?

MS. BARATH: No, Your Honor, we have no additional exhibits at this time.

THE COURT: All right. Let me say this to our friends in the gallery: The Court considers closing arguments and its final instructions to the jury as the most serious part of a very serious process.

Once I bring the jury in and begin my final instructions leading up to counsel's final arguments, I do not expect any distractions.

I do not want an inordinate amount of shuffling, whispering, coming, going, doors opened and being closed. I want it as quiet and as respectful as reasonably possible. So bear that in mind, if you will, as we move toward that part of the process.

Is Plaintiff aware of anything that needs to be taken up before I bring in the jury and begin the final jury instructions?

MR. WARD: No, Your Honor.

THE COURT: Is Defendant?

MR. SGANGA: No, Your Honor.

THE COURT: All right. Then, Mr. Nance, would you bring in the jury?

COURT SECURITY OFFICER: All rise for the jury.

(Jury in.)

THE COURT: Welcome back, Ladies and Gentlemen.

Please have a seat.

Ladies and Gentlemen of the Jury, you have now heard the evidence in this case, and I will now instruct you on the law that you must apply.

Each of you are going to have your own printed copy of these final jury instructions that I'm giving you now, so there's really no need for you to take notes unless you just particularly want to.

It's your duty to follow the law as I give it to you. On the other hand, Ladies and Gentlemen, as I've said previously, you, the jury, are the sole judges of the facts in this case.

Do not consider any statement that I have made in the course of the trial or make during these instructions as an indication to you that I have any opinion about the facts in this case.

You're about to hear closing arguments from the attorneys.

Statements and arguments of the attorneys, I remind

you, are not evidence, and they are not instructions on the law. They're intended only to assist the jury in understanding the evidence and the parties' contentions.

A verdict form has been prepared for you. You are to take this verdict form with you to the jury room; and when you have reached a unanimous decision or agreement as to the verdict, you're to have your foreperson fill in the blanks in the verdict form, date it, and sign it.

Answer each question in the verdict form from the facts as you find them to be. Do not decide who you think should win the case and then answer the questions to reach that result. Again, your answers and your verdict must be unanimous.

In determining whether any fact has been proven in this case, you may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, and you may consider the effect of all the exhibits received and admitted into evidence, regardless of who may have produced or presented them.

You, the jurors, are the sole judges of the credibility of each and every witness and the weight and evidence to be given to the evidence in this case -- the weight and effect to be given to the evidence in this case.

I knew that didn't sound right.

As I've told you previously, the attorneys in this

case are acting as advocates for their competing parties and their competing claims, and they have a duty to object when they believe evidence is offered that should not be admitted under the rules of the Court.

In that case, when the Court has sustained an objection to a question addressed to a witness, you are to disregard the question entirely, and you may not draw any references from its wording or speculate about what the witness would have said if I had permitted them to answer the question.

If, on the other hand, the objection was overruled, then you're to treat the answer to the question and the question itself just as if no objection had been made; that is, like any other question and answer.

Now, at times during the trial, it was necessary for the Court to talk to the lawyers here at the bench or outside of your hearing when you were in the jury room. This happens because during a trial, there are things that sometimes come up that do not involve the jury.

You should not speculate, Ladies and Gentlemen, about -- about what was said during such discussions that took place outside of your presence.

Now, there are two types of evidence that you may consider in properly finding the truth as to the facts in this case. One is direct evidence, such as the testimony of

an eyewitness.

The other is indirect or circumstantial evidence; that is, the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts.

As a general rule, you should know that the law makes no distinction between direct or circumstantial evidence, but simply requires that you, the jury, find the facts based on the evidence presented, both direct and circumstantial.

The parties may have stipulated or agreed to some facts in the case. When the lawyers for both sides stipulate as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence and regard the fact as proven.

Certain testimony in the case has been presented to you through depositions. A deposition is the sworn, recorded answers to questions asked to a witness in advance of the trial. If a witness cannot be present to testify in person, then the witness's testimony may be presented under oath in the form of a deposition.

As I told you earlier, before the trial, the attorneys representing the parties in this case questioned these deposition witnesses under oath. At that time, a court reporter was present and recorded their sworn testimony.

Deposition testimony is entitled to the same

consideration by you, the jury, as testimony given by a witness in person from the witness stand in open court.

Accordingly, you should judge the credibility and importance of the deposition testimony to the best of your ability, just as if the witness had testified before you in open court.

While you should consider only the evidence in this case, Ladies and Gentlemen, you should understand that you are permitted to draw such reasonable inferences from the testimony and the exhibits as you feel are justified in the light of common experience.

In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and the evidence in this case.

However, you should not base your decision on any evidence not presented by the parties in open court during the trial of this case, including your own personal experiences with any particular refrigerator or water filter.

Now, unless I instruct you otherwise, you may properly determine that the testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary if after considering all of the other evidence you believe that single witness.

When knowledge of a technical subject may be helpful to the jury, a person who has special training and experience in that technical field, called an expert witness, is permitted to state his or her opinions on those technical matters to the jury.

However, Ladies and Gentlemen, you're not required to accept those opinions. As with any other witness, it is solely up to you to decide who you believe and who you don't believe and whether or not you want to rely on their testimony.

Now, certain exhibits have been shown to you during the trial that were illustrations. We call these types of exhibits demonstrative exhibits or sometimes just demonstratives for short.

Demonstrative exhibits are a party's description, picture, or model to describe something involved in this trial. If your recollection of the evidence differs from the demonstratives, you should rely on your recollection.

Demonstrative exhibits are sometimes called jury aids.

Demonstrative exhibits are not evidence, Ladies and Gentlemen, but they are -- but the -- but the witness's testimony concerning the demonstrative evidence or the demonstrative exhibit is evidence. The demonstrative is not evidence, but the witness's testimony during which they use

the demonstrative is evidence.

In any legal action, facts must be proven by a required amount of evidence known as the burden of proof.

The burden of proof in this case is on Whirlpool for some issues, and it is on TST Water for other issues.

There are two burdens of proof that you will apply in this case, the preponderance of the evidence and clear and convincing evidence.

The Plaintiff, Whirlpool, has the burden of proving patent infringement by a preponderance of the evidence. The Plaintiff, Whirlpool, also has the burden of proving willful patent infringement by a preponderance of the evidence.

The Plaintiff, Whirlpool, also has the burden of proving damages for any patent infringement by a preponderance of the evidence.

A preponderance of the evidence means evidence that persuades you that a claim is more probably true than not true. Sometimes this is talked about as being the greater weight and degree of credible testimony.

The Defendant, TST Water, has the burden of proving patent invalidity by clear and convincing evidence. Clear and convincing evidence means evidence that produces in your mind an abiding conviction that the truth of the party's factual contentions are highly probable.

Although proof to an absolute certainty is not

required, the clear and convincing evidence standard requires a greater degree of persuasion than is necessary for the preponderance of the evidence standard.

If the proof establishes in your mind an abiding conviction in the truth of the matter, then the clear and convincing evidence standard has been met.

These standards are different from what you may have learned about in criminal proceedings where a fact is proven beyond a reasonable doubt.

On a scale of the various standards of proof, as you move from the preponderance of the evidence, where the proof need only be sufficient to tip the scales in favor of the party proving the fact, to at the other end beyond a reasonable doubt, where the fact must be proven to a very high degree of certainty, you may think of clear and convincing evidence as being between those two standards.

In determining whether any fact has been proved by a preponderance of the evidence or by clear and convincing evidence, you may, unless otherwise instructed, consider the stipulations, the testimony of all the witnesses, regardless of who called them, and all the exhibits received into evidence during the trial, regardless of who may have produced them.

Now, as I did at the beginning of the case, I'll give you a summary of each side's contentions, and then I'll

provide you with detailed instructions on what each side must prove to win on each of its contentions.

As I told you previously, this case concerns one United States patent, that being U.S. Patent No. 7,000,894, which you've consistently heard referred to throughout the trial as the '894 patent.

I'll refer to this as the patent-in-suit. I may also refer to it as the asserted patent.

Whirlpool, the Plaintiff, seeks money damages from TST Water, the Defendant, for allegedly infringing the patent-in-suit, the '894 patent, by making, using, selling, and/or offering for sale in the United States its W-5 filters and other filters, which collectively are referred to as the W-5 filters or the accused products, that are designed to fit in the place of Whirlpool's Filter 3.

Whirlpool contends that TST's accused products infringe the following claims of the '894 patent: Claim 1, Claim 4, Claim 10, Claim 15, Claim 17, Claim 20, and Claim 27.

All of these claims are sometimes referred to as the asserted claims. Whirlpool has alleged that the accused products infringe the asserted claims either literally or through the Doctrine of Equivalents.

Whirlpool also alleges that TST's infringement -- TST Water's infringement is and has been willful. Whirlpool

seeks lost profits and a reasonable royalty for TST Water's alleged infringement.

TST Water denies that the W-5 filters infringe any of the asserted claims of the '894 patent, the asserted patent, either literally or under the Doctrine of Equivalents.

TST Water further denies that -- it further denies Whirlpool's allegation that it willfully infringed any claim of the '894 patent.

TST Water also contends that the asserted claims of Whirlpool's patent are invalid as being obvious.

The Defendant, TST Water, contends that all the asserted claims are obvious in view of prior art that existed before Whirlpool's alleged inventions, and, therefore, the '894 patent's asserted claims are invalid.

Now, invalidity is a defense to infringement. TST Water denies that it owes Whirlpool any damages in this case.

Invalidity and infringement are separate and distinct issues, however. And your job is to decide whether the asserted claims of the asserted patent have been infringed and whether any of the accused claims of that patent are invalid.

Now, if you decide that any claim has been infringed and is not invalid, then you'll need to decide whether TST's infringement has been willful, and you'll need

to decide the amount of money damages that are to be awarded to Whirlpool as compensation for that infringement.

Now, before you can decide many of the issues in this case, you'll need to understand the role of the patent claims.

The patent claims are the numbered sentences at the end of the patent.

The claims are important, Ladies and Gentlemen, because it is the words of the claims themselves that define what the patent covers. The figures and the text in the rest of the patent provide a description or examples of the invention, and they provide a context for the claims; but it is the claims that define the breadth of the patent's coverage.

Each claim is effectively treated as if it were its own separate patent, and each claim may cover more or may cover less than any other claim. Therefore, what a patent covers collectively or as a whole depends on what each of its claims cover.

Claims may describe apparatuses, devices, or products, such as machines. I'll call those type claims apparatus claims. Claims may also describe methods for using a product. And I'll call those type of claims method claims.

In this case, Whirlpool has asserted apparatus claims, as well as method claims.

You first need to understand what each claim covers in order to decide whether or not there is infringement of that claim and to decide whether or not the claim is invalid.

And the first step is to understand the meaning of the words used in the patent claim.

Now, the law says that it is my role to define the terms of the claims, but it is your role to apply my definitions to the issues that you're asked to decide in this case.

Accordingly, as I explained at the beginning of the case, I've determined the meaning of certain patent limitations, and I've provided those definitions to you in your juror notebooks.

You must accept my definitions of these words in the claims as being correct, and it is your job to take these definitions that I have supplied and apply them to the issues that you are asked to decide, including the issues of infringement and invalidity.

You should disregard any evidence presented in the trial which contradicts or is inconsistent with the constructions and definitions that I have given to you.

For claim limitations where I have not construed, that is defined or interpreted, any particular term, you are to use the plain and ordinary meaning of that term as understood by one of ordinary skill in the art, which is to

say, in the field of technology of the patent at the time of the alleged invention.

The meanings of the words of the patent claims must be the same when deciding both the issues of infringement and validity.

You've been provided with a complete copy of the '894 patent, the asserted patent, inside your juror notebooks, and you may use it, Ladies and Gentlemen, in your declarations.

I'll now explain how a claim defines what it covers.

A claim sets forth, in words, a set of requirements. Each claim sets forth its requirements in a single sentence. If a device satisfies each of these requirements in that sentence, then it is covered by and infringes the claim.

There can be several claims in a patent. A claim may be narrower or broader than another claim by setting forth more or fewer requirements. The coverage of a patent is assessed on a claim-by-claim basis.

In patent law the requirements of a claim are often referred to the "claim elements" or they're sometimes referred to as the "claim limitations."

When a product meets all the requirements of a claim, where it meets all of its limitations or all of its

elements, the claim is said to cover that product; and that product is said to fall within the scope of that claim. In other words, a claim covers a product where each of the claim elements or limitations is present in that product.

If a product is missing even one limitation or element of a claim, the product is not covered by that claim. If the product is not covered by the claim, the product does not infringe the claim.

Now, the beginning portion or preamble of a claim often uses the word "comprising." The word "comprising," as we've mentioned before, when used in a preamble, means "including but not limited to" or "containing but not limited to."

When "comprising" is used in the preamble, if you -- if you decide that the accused product includes all of the requirements of that claim, the claim is infringed. That's true even if the accused instrumentality contains additional or added elements.

For example, a claim to a table comprising a tabletop, legs, and glue would be infringed by a table that includes a tabletop, legs, and glue even if the table also includes other elements, such as wheels on the ends of the table's legs.

This case involves two types of patent claims: Independent claims and dependent claims.

An independent claim does not refer to any other claim in the patent. An independent claim sets forth all the requirements that must be met in order to be covered by the claim. It's not necessary to look to any other claim to determine what an independent claim covers.

However, a dependent claim does not by itself recite all the requirements of the claim but refers to another claim or claims for some of its requirements. In this way, the dependent claim depends on another claim.

The law considers a dependent claim to incorporate all the requirements of the claim or claims to which it refers or depends, as well as the additional claims set forth in the dependent claim itself.

To determine what a dependent claim covers, it's necessary to look at both the independent (sic) claim and any other claim to which it refers. And a product that meets all the requirements of both the dependent claim and the claim or claims to which it refers is covered by that dependent claim.

A patent owner has the right to stop others from using the invention covered by its patent claims in the United States during the life of the patent.

If a person makes, uses, sells, or offers for sale within the United States or imports into the United States what is covered by a patent claim without the patent owner's permission, that person is said to infringe the patent.

In reaching your decision on infringement, keep in mind, Ladies and Gentlemen, that only the claims of a patent can be infringed.

You must compare the asserted patent claims, as I've defined each of them, to the accused products and -- to determine whether or not there is infringement.

You should not compare the accused products with any specific example set out in the patent or with the patent owner's commercial products or with the prior art in reaching your decision on infringement.

As I've reminded you during the trial, the only correct comparison is between the accused products and the language of the claim itself.

You must reach your decision as to each assertion of infringement based on my instructions about the meaning and the scope of the claims, the legal requirements for infringement, and the evidence presented to you by both of the parties.

Also, I remind you, the issue of infringement is assessed on a claim-by-claim basis. Therefore, there may be infringement as to one claim even if there is no infringement as to other claims.

I'll now instruct you on the specific rules that you must follow to determine whether the Plaintiff, Whirlpool, has proven that the Defendant, TST, has infringed

one or more of the patent claims involved in this case.

In order to prove direct infringement of a patent claim, Whirlpool must show by a preponderance of the evidence that the accused product includes each and every requirement or limitation of the claim either literally or under the Doctrine of Equivalents.

In determining whether an accused product literally infringes or directly infringes a patent claim in this case, you must compare the accused product with each and every one of the requirements or limitations of that claim to determine whether the accused product contains each and every requirement recited in the claim.

A claim requirement is present if it exists in the accused product just as -- just as it is described in the claim language, either as I have explained the language to you; or if I did not explain it or construe it, as it would have been understood by one of ordinary skill in the art.

If an accused product omits any element recited in a claim, then you must find that the particular product does not literally infringe that claim.

A patent can be directly infringed even if the alleged infringer did not have knowledge of the patent and without the infringer knowing that what it was doing is infringement of the claim.

A patent may also be directly infringed, even

though the accused infringer believes in good faith that what it is doing is not infringement of the patent.

A Plaintiff may show direct infringement by comparing the claims of the accused products and showing that each and every element of the claims is present therein.

A claim requirement is literally present if it exists in an accused product, just as it's described in the claim language, either as I have explained it to you, or if I didn't explain it, as it's understood -- or as -- as it would be understood by its plain and ordinary meaning by one of skill in the art.

If an accused product omits any requirement recited in the claim, you must find that particular product does not infringe that claim.

If a person makes, uses, sells, or offers for sale within the United States a product or practices a method that does not meet all the requirements of a claim and thus does not literally infringe the claim, there can still be direct infringement if that product satisfies the claim under the Doctrine of Equivalents.

Under the Doctrine of Equivalents, a product infringes a claim if the accused product performs steps or contains elements corresponding to each and every requirement of the claim that is equivalent to, even though not literally met by, the accused product.

You may find that a step or element is equivalent to a requirement of a claim that is not literally met if a person having ordinary skill in the field of the technology of the patent would have considered the differences between them to be insubstantial or would have found that the structure in TST Water's product:

(1) performs substantially the same function; (2) in substantially the same way; (3) to achieve substantially the same result as the requirement of the claim.

In order to prove infringement by equivalents, Whirlpool must prove the equivalency of each claim element by a preponderance of the evidence.

In this case, Whirlpool contends that TST Water has willfully infringed its patent. If you've decided that TST Water has infringed, you must go on and address the additional issue of whether or not that infringement was willful.

You may find that TST Water willfully infringed if you find that TST Water acted egregiously, willfully, or wantonly. You may find that TST Water's actions were egregious, willful, or wanton if TST Water acted in reckless or callous disregard of or with indifference to the rights of Whirlpool.

A Defendant is indifferent to the rights of another when it proceeds in disregard of a high or excessive danger

of infringement that is known to it or was apparent to a reasonable person in its position.

Your determination of willfulness should incorporate the totality of the circumstances based on the evidence presented during this trial. If you decide that any infringement was willful, that decision should not affect any damages that you award. I will take willfulness into account later.

Now, Whirlpool has the burden of proving willfulness by a preponderance of the evidence.

I'll now instruct you on the rules that you must follow in deciding whether or not TST Water has proven that the asserted claims of the patent are invalid.

An issued patent is accorded a presumption of validity based on the presumption that the United States Patent and Trademark Office, which you've heard referred to throughout this trial as the PTO or the Patent Office, acted correctly in issuing the patent.

This presumption of validity extends to all issued United States patents.

To prove that any claim of a patent is invalid, TST Water must persuade you by clear and convincing evidence that the claim is invalid. Like infringement, Ladies and Gentlemen, invalidity is determined on a claim-by-claim basis.

You must determine separately for each claim whether that claim is invalid. If one claim of a patent is invalid, this does not mean that any other claim is necessarily invalid.

Claims are construed in the same way for determining infringement as for determining invalidity. You must apply the claim language consistently and in the same manner for issues of infringement and for issues of invalidity. In making your determination as to invalidity, you should consider each claim separately.

Prior art differing from the prior art considered by the Patent Office may, but does not always, carry more weight than prior art that was considered by the Patent Office.

TST Water contends in this case that the asserted claims of the asserted patent are invalid as being obvious. Even though an invention may not have been identically -- even though each -- even though an invention may not have been identically disclosed or identically described in a single prior art reference before it was made by an inventor, the invention may have been obvious to a person of ordinary skill in the -- in the field of technology of the patent at the time the invention was made.

TST Water, the Defendant, bears the burden of establishing obviousness by clear and convincing evidence.

In determining whether a claimed invention is obvious, you must consider the level of ordinary skill in the field of technology of the patent that someone would have had at the time the claimed invention was made, the scope and content of the prior art, and any differences between the prior art and the claimed invention, as well as the ordinary knowledge of a person of ordinary skill at the time of the invention.

The skill of the actual inventor is not necessarily relevant because inventors may possess something that distinguishes them from workers of ordinary skill in the art.

Keep in mind that the existence of each and every element of the claimed invention in the prior art does not necessarily prove obviousness. Most, if not all, inventions rely on the building blocks of prior art.

Now, in considering whether a claimed invention is obvious, you should consider whether, as of the priority date of the asserted patent, there was a reason that would have prompted a person of ordinary skill in the field to combine the known elements in a way that the claimed invention does, taking into account such facts as:

(1) whether the claimed invention was merely the predictable result of using prior art elements according to their known function.

(2) whether the claimed invention provides an

obvious solution to a known problem in the relevant field.

(3) whether the prior art teaches or suggests the desirability of combining elements in the claimed invention.

(4) whether the prior art teaches away from combining elements in the claimed invention.

(5) whether it would have been obvious to try the combinations of elements in the claimed invention, such as when there is a design need or market pressure to solve a problem, and there are a finite number of identified predictable solutions.

And, (6), whether the change resulted more from design incentives or other market forces.

Now, in determining whether the claimed invention was obvious, consider each claim separately, and consider only what was known at the time of the invention.

In determining whether the claimed invention was obvious, do not use hindsight. In other words, Ladies and Gentlemen, you should not consider what a person of ordinary skill in the art would know now or what has been learned from the teaching of the patent-in-suit.

In making these assessments, Ladies and Gentlemen, you should take into account any objective evidence, sometimes called secondary considerations, that may have existed at the time of the invention and afterwards that shed light on non-obviousness.

The following are possible secondary considerations, but it's up to you to decide whether secondary considerations of non-obviousness exist at all.

(1) whether the invention was commercially successful as a result of the merits of the claimed invention, rather than the result of design needs or market pressure, advertising, or similar activities.

(2) whether the invention satisfied a long-felt need.

(3) whether others had tried and failed to make the invention;

(4) whether others copied the invention;

(5) whether there were changes or related technologies or market needs contemporaneous with the invention;

(6) whether the invention achieved unexpected results;

(7) whether others in the field praised the invention;

(8) whether persons having ordinary skill in the art of the invention expressed surprise or disbelief regarding the invention;

(9) whether others sought or obtained rights to the patent from the patentholder;

And (10) whether the inventor proceeded contrary to

accepted wisdom in the field.

In support of obviousness, you may also consider whether others independently invented the claimed invention before or at about the same time as the named inventor thought of it.

If you find that TST Water has proven the obviousness of a claim by clear and convincing evidence, then you must find that the claim is invalid.

Now, several times in my -- in my instructions, I've referred to an -- a person of ordinary skill in the field of the invention. It's up to you to decide the level of ordinary skill in the field of the invention.

In deciding what the level of ordinary skill is, you should consider all of the evidence introduced at trial including:

(1) the levels of education and experience of persons working in the field;

(2) the types of problems encountered in the field;

(3) prior art solutions to those problems;

(4) rapidity with which innovations are made;

And (5) the sophistication of the technology.

A person of ordinary skill in the art is a hypothetical person who is presumed to have known all of the relevant prior art at the time of the claimed invention.

If you find that the TST Water has infringed any

claim of Whirlpool's asserted patent, and if you find that the claim is not invalid, then you must consider what amount of damages to award to Whirlpool.

I'll now instruct you on the measure of damages. But by instructing you on damages, I'm not suggesting which party should win this case on any issue.

The damages you award must be adequate to compensate Whirlpool for any infringement you may find. You must not award Whirlpool more damages than are adequate to compensate for the infringement, nor should you include any additional amount for the purpose of punishing TST Water or setting an example.

Whirlpool has the burden to establish the amount of its damages by a preponderance of the evidence. The patent owner is not entitled to damages that are remote or are speculative.

I'll give you more detailed instructions on damages shortly. Note, however, that if you determine that a patent -- that the patent is infringed and not invalid, Whirlpool is entitled to recover no less than a reasonable royalty for each infringing sale or use of its inventions.

Whirlpool seeks either a reasonable royalty or lost profits as damages for each of TST Water's sales that you find infringe any valid claim of the patent.

The determination, Ladies AND Gentlemen, of a

damages award is not an exact science, and the amount need not be proven with unerring precision. You may approximate, if necessary, the amount to which the patent owner is entitled.

It may be proper to award -- to award a damages amount if the evidence shows the extent of the damages as a matter of just and reasonable inference.

Whirlpool is seeking its lost profits as part of its patent damages. Lost profits consist of any actual reduction in business profits that Whirlpool suffered as a result of TST Water's alleged infringement.

In this case, Whirlpool seeks to recover lost profits for some of TST Water's sales and a reasonable royalty on the rest of TST Water's sales of the W-5 products.

To recover lost profits, as opposed to a reasonable royalty, Whirlpool must show a causal relationship between the infringement and Whirlpool's loss of profits.

In other words, Whirlpool must show a reasonable -- a reasonable probability that would it -- that it would have made the asserted sales but for the infringement.

Whirlpool must prove that if there had been no infringement, Whirlpool would have made some portion of the sales that TST Water made on the infringing products. In other words, Whirlpool needs to show that TST Water's products took sales away from Whirlpool's products.

Whirlpool may only receive damages for lost profits on those products that are sufficiently similar to compete in the same market with the same customers as TST Water's products that you find to infringe. Two products are sufficiently similar if one does not have characteristics significantly different than the other.

In order to be entitled to lost profits, Whirlpool must establish each of the following factors:

(1) that there was a demand for the patented products;

(2) there was no available acceptable non-infringing substitute products;

(3) that Whirlpool has the manufacturing and marketing capability to make the infringing sales actually made by TST Water and for which Whirlpool seeks an award of lost profits;

And (4) the amount of profit that Whirlpool would have made if TST Water had not infringed.

Now, the parties have stipulated that Factor 2 and Factor 3 are met in this case.

Whirl -- Whirlpool can prove there was a demand for the patented product in one of two ways.

First, Whirlpool can show significant sales of its own patented products.

Second, Whirlpool can show demand for the patented

products by showing significant sales of TST Water's products that are covered by the patent-in-suit.

If you conclude that Whirlpool has proved that but for TST Water's infringement, Whirlpool would have made some portion of TST Water's sales, Whirlpool may calculate its lost profits by computing the lost revenue for sales it proved that it would have made but for the infringement and subtracting from that figure the amount of additional cost or expenses it would have incurred in making those lost sales such as the cost of goods, sales costs, packaging costs, and shipping costs.

Under the patent laws, if infringement of a patent not determined to be invalid is found, Whirlpool is entitled to recover no less than a reasonable royalty for each infringing sales or use of its inventions.

This means that if you've determined that Whirlpool is entitled to damages, you should award Whirlpool a reasonable royalty for those TST Water sales of the W-5 filter for which you have not awarded any lost profits.

A royalty is a payment to a patentholder in exchange for the right to make, use, sell, or import the claimed invention.

A reasonable royalty is the amount of money to be paid for a license to make, use, or sell the invention that a willing patent owner and a willing prospective licensee would

have agreed to immediately before the infringement began as a part of a hypothetical negotiation.

In considering this hypothetical negotiation, Ladies and Gentlemen, you should focus on what the expectations of the patentholder and the infringer would have been had they entered into an agreement at that time and had they acted reasonably in their negotiations.

In determining this, you must assume that both parties believed the patent was valid and infringed and that the patentholder and the infringer were willing to enter into an agreement.

The reasonable royalty you determine must be the royalty that would have resulted from this hypothetical negotiation and not simply the royalty that either party would have preferred.

Evidence of things that happened after the infringement first began may be considered in evaluating the reasonable royalty only to the extent that the evidence aids in assessing what royalty would have resulted from a hypothetical negotiation.

Where the parties dispute a matter concerning damages for infringement, it is Whirlpool's burden to prove what is more probable than not that Whirlpool's version is correct.

Whirlpool must prove the amount of its damages with

reasonable certainty, but need not prove the damages by mathematical precision. Whirlpool, again, is not entitled to damages that are remote or speculative.

The amount you find as damages must be based on the value attributable to the patented technology, as distinct from other unpatented features of the accused product.

Whirlpool bears the burden to establish the amounts attributable to the patented feature.

In determining the reasonable royalty, you should consider all facts known and available to the parties at the time the infringement began.

Some of the kinds of factors that you should consider in making your determination are:

(1) the royalties received by the patentee for licensing of the asserted patent proving or tending to prove an established royalty.

(2) the rates paid by the licensee for the use of other patents comparable to the asserted patent.

(3) the nature and scope of the license, as exclusive or non-exclusive, or as restricted or non-restricted, in terms of territory or with respect to whom the manufactured product may be sold.

(4) the licensor's established policy and marketing program to maintain its patent monopoly by not licensing others to use the invention or by granting licenses under

specific conditions designed to preserve that monopoly.

(5) the commercial relationship between licensor and licensee, such as whether they are competitors in the same territory in the same line of business, or whether they are inventor and promoter.

(6) the duration of the patent and the term of the license.

(7) the established profitability of the product made under the patent, its commercial success, and its current popularity.

(8) the utility and advantages of the patented invention over the old modes or devices, if any, that had been used for achieving similar results.

(9) the nature of the patented invention and the benefits to those who have used the invention.

(10) the extent to which the infringer has made use of the invention and any evidence probative of the value of that use.

(11) the value that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer.

(12) the opinion testimony of qualified experts.

And, (13) the amount that a licensor, such as the patentee, and a licensee, such as the infringer, would have

agreed upon at the time the infringement began if both sides had been reasonably and voluntarily trying to reach an agreement.

That is, Ladies and Gentlemen, the amount which a prudent licensee who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable to a prudent patentee who was willing to grant a license.

Now, no one of these factors is dispositive, and you can and should consider the evidence that has been presented to you in this case on each of these factors.

Although evidence of the actual profits an infringer made may be used to determine the anticipated profits at the time of the hypothetical negotiation, the royalty may not be limited or increased based on the actual profits the alleged infringer made.

You may also consider any other factors which in your minds would have increased or decreased the royalty the infringer would have been willing to pay and the patent owner would have been willing to accept acting as normally prudent business people.

When determining a reasonable royalty, you may consider evidence concerning the amounts that other parties

have paid for rights to the patent in question or for rights to similar technologies.

A license agreement need not be perfectly comparable to a hypothetical license that would be negotiated between Whirlpool and TST Water in order for you to consider it.

However, if you choose to rely on evidence from any other license agreements, you must account for any differences between those licenses and the hypothetically negotiated license between Whirlpool and TST Water in terms of the technologies and economic circumstances of the -- of the contracting parties when you make your reasonable royalty determination.

The date that Whirlpool filed its complaint in this case alleging patent infringement is the date for the start of damages. Therefore, damages that you may award Whirlpool begin on September the 15th, 2015.

Now, with those instructions, Ladies and Gentlemen, we're ready to hear closing arguments from the attorneys in this case.

The Plaintiff may now present its first closing argument to the jury.

Mr. Ward, would you like a warning on your time?

MR. WARD: I would, Your Honor, 18 minutes.

THE COURT: 18 minutes used or 18 minutes left?

MR. WARD: I'm sorry, 18 minutes used.

THE COURT: I'll warn you when you've used 18 minutes. You may proceed.

And let me ask those present not to come, go, or leave during closing arguments. I don't want to see any movement in the gallery.

All right. Mr. Ward, when you're ready.

MR. WARD: May it please the Court.

Counsel.

Members of the jury, good morning.

I want to start by thanking you for your service, because without your showing up for jury selection on Monday, none of this would be possible. I know you've all got lives to tend to, you've got jobs, and you've given us that time, and we appreciate it.

I told you at the beginning of the case that this would be about some simple lessons, I thought. Don't take things that don't belong to you, and play by the rules. And we know that when you don't do those things, there are consequences.

You've heard a lot of evidence, and you just heard His Honor's instructions about what you're to do now. You're the sole judges of the credibility of the witnesses, and you're the sole judges of the facts.

In the next 20 minutes, I'm going to tell you

briefly where I think the evidence points. I can't summarize it all in 20 minutes, and I know you all appreciate that we've got some time limits because you've been sitting here for a while, so I'm going to jump right into it.

But I'm going to start with the second question on -- on your verdict form. And that is going to be obviousness, because that's where we -- we left off yesterday.

And I want to start with the Defendant's burden in this case, clear and convincing evidence; that evidence that produces in your mind an abiding conviction that the truth of TST's factual contentions are highly probable.

Because as you've learned, patents are presumed to be valid. And there's a reason. Patents are so important to the founders of our country that they included them in the Constitution. They're in the Constitution. They're before the Bill of Rights. They're before the First Amendment and the Second Amendment.

And that's what's made our country one of the most innovative countries in the world because of the -- the protection that we afford to those who develop intellectual property, and that -- that protection is embodied in the patent.

And because the patent is such a valuable right -- can be a valuable right, the law imposes this higher burden

because invalidating a patent, which is what TST wants you to do -- they want to you invalidate this patent. That's not just for this case. That's for all time.

So a decision of invalidity would be like tearing this patent up. So that's why they have a higher burden.

You've -- you've heard the evidence of the re-examination. You know that it was issued once when the examiners examined the patent back in 2003.

Then it was examined a second time, and you learned that there were three examiners who looked at it that time.

And after that re-examination proceeding, they said, no, we got it right the first time.

So now the Defendant comes before you and says, they got it wrong. All those folks got it wrong.

What evidence did they bring you?

They talked to you about a number of patents. These weren't all references that they're going to rely upon for invalidating that they want you to rely upon. They said they're lots of patents on water filters.

They even talked to you about a water filter patent that Mr. Baird had. Now, that patent had never been licensed by anybody, but they said it's valid.

Remember, Mr. Baird said, well, my patent's good. The Patent Office got it right on mine. The Patent Office got it right on all these other patents.

But the Patent Office got it wrong on one of the best-selling water filters on the market. They want you to believe that the Patent Office messed up on this one, while all the others were right.

And so what and who did they bring to you to meet this heavy burden?

They brought you Mr. Stein, and he says that one of ordinary skill in the art would have combined a filter from a backhoe with a filter on a beer keg with a wall filter.

That's -- that's what they want you to believe one of ordinary skill in the art would combine in order to have you invalidate the '894.

But recall from His Honor's instructions, and you'll have a chance to read them, keep in mind the existence of each and every element of the claimed invention in the prior art does not necessarily prove obviousness. Most inventions rely upon building blocks of prior art.

And you are instructed not to use hindsight, which is what Mr. Stein did. He took the '894, and then he went looking through the prior art to see what he could find that would come up with some of the same elements that are disclosed in the claims of the '894 patent.

See if Mr. Sganga can answer this question during his closing: What is the evidence that one of ordinary skill in the art would have been motivated to combine these

references?

There was no evidence of that. Mr. Stein just said, oh, yeah, they -- they would have combined these references. What was the evidence of that other than Mr. Stein saying it?

You can think about the secondary considerations, the commercial success of the filter, whether others had copied it, whether or not it's obvious. Other folks are copying it, it wasn't obvious to many folks. They had to copy what Whirlpool came up with.

But even if you believe that folks would have combined these references, Mr. Stein says, oh, yeah, they would have combined them, and all the elements are present.

That's what he said on direct, and then we learned that he doesn't even know how to hook the hoses up to the right inlet and outlet valves.

And then we learned during his cross-examination that Knuth, the backhoe filter, is missing these limitations.

And they've got to prove to you that every limitation is present in these references when they combine them. They have not met their burden.

We'd ask that you answer Claim -- or Question No. 2, obviousness, no.

Infringement. Remember what they tell us outside of the courtroom. Outside of the courtroom they guarantee

the W-5 filter to fit. Guaranteed to fit. In fact, they set up a 1-800 number, and they put a video up on the Internet because folks were calling and saying, my, this looks different, this looks different when I take the protective end caps off.

And what does TST say outside of the courtroom? Don't worry about it. It's going to work just like the original equipment. It'll work just -- just fine in your -- your filter -- in your refrigerator.

What did we do to meet our burden? Who did we bring you? Dr. Beaman. A professor at the University of Texas in mechanical engineering. And he walked you through the claims of the '894 that are being asserted.

Because remember, that's what we've got to do. We -- we don't compare the W-5 to the Filter 3. We compare the claims of the patent to the W-5. Does the W-5 meet each and every limitation of those claims?

And he walked you through that evidence. He showed you where the limitations were met.

And think about this, TST has had a year-and-a-half to prepare for the cross-examination of Dr. Beaman. They've had his expert report. They took his deposition. They reviewed all the documents. And they conducted a 90-minute examination of him on his opinions on infringement.

Did you see them put any of the claim charts up and

go through and show where these elements were not met? No. For 80 of the 90 minutes we talked about the price of plastic tubing, elbow joints, foam in the filter, whether or not you could save an inch, what was the value of saving an inch.

Because you know what they were doing, they were trying to say this really isn't that valuable. It's one of -- they go through their laundry list of defenses.

They say, oh, it's invalid. Well, if it's not invalid, then we don't trespass. But if we do trespass on a valid patent, then it's really not that valuable. And that's what that cross-examination was about.

Because in the last 10 minutes they kind of did a hand wave about the protrusion extending from the end piece wall and the longitudinal axis. 10 minutes is what they spent with Dr. Beaman.

But let's look at it. You've seen the animation, the melting away of this cosmetic change. And we learned during Dr. -- Mr. Baird's examination about this drawing where they took -- they did a scan of the Filter 3, and they superimposed it upon Mr. Baird's design.

And you can see that these are cosmetic changes. In fact, when I put his -- his models were in front of him, we started talking about what this protrusion extending from the end piece wall, how it changed over time. You could see it right in front of you. I said did -- we started talking

about function-way-result.

Remember, I said did each of these protrusions have the same function-way-result?

He said: Well, they all had the same function or result, we marched through them. He said: But my -- the last one, the W-5, does it a different way.

His models, I don't think we're going to see them through closing, maybe we will, his models have the same function-way-result for the protrusion. He only contested "way," that the protrusion didn't act in the same way.

The protrusion extends from the end piece wall both literally and under the Doctrine of Equivalents.

We were walking out of the courthouse the other day, and a member of our team asked me if the Lady Justice extended from the roof of the courthouse. Think about this: There's a longitudinal axis running down through the Lady of Liberty into the center of that dome.

The Defendants would say, oh, no, she doesn't extend from the roof of the courthouse because there's -- there's air in between here. She can't extend from. That's what they -- they'd have you believe that she doesn't extend from the roof of the courthouse.

Their other challenge is this longitudinal axis. They come in and they -- in the court they start saying, well, there's two longitudinal axes. This blue line actually

ends here. It ends right at the tip.

And then there's another axis. That's what they tell you in the courtroom, there's two axes.

And we start talking to Mr. Baird. And he admits that, well, for making the measurements to guarantee fit, he uses a longitudinal axis that runs through the center of these inlets, the outlet, both of those fittings, and the protrusion.

Then he says, but it's -- it's a different protrusion if you look at it from the side. Look at it as a design drawing, and what does he get? He's got a single longitudinal axis running through that inlet/outlet, and through the protrusion.

Dr. Beaman explained this to you. Those are the only two elements -- I told you in opening, I thought those were two -- the two that they would contest, and that's what they did.

We think the evidence supports an answer of infringement, yes, as to each of the asserted claims.

Willfulness. The Court has instructed you on what is willfulness when -- if TST, you've got to decide whether they were indifferent to the rights of Whirlpool, whether it proceeded in disregard of a high and excessive danger of infringement that is known to it or apparent to a reasonable person in its position.

We know Mr. Baird was aware of the patent in 2010 or 2011; that he studied it for four years in coming up with these cosmetic changes. He was aware that it was challenged at the Patent Office. He was watching it. He was aware that it was confirmed. He was aware that there had been 30 other companies who had been sued and who'd settled.

We saw his email where he was watching things going on. And he said, oh, it's a 50/50 shot, and we learned that he talked to the president of Swift Green while this was going on.

You think about that, that phone call, because I think it's reasonable that Mr. Baird might have said, you know what, you take your shot in the Patent Office. If you invalidate, then good for all of this. But if you lose there, I'll have my shot at the courthouse. I'll have two -- two bites at this apple. He knew this was going on. And when they lost, he proceeded to launch his product.

And in opening, I think I gave him too much credit. I said that the reason he did that was because of this 7-million-dollar hole because I was confused. I thought it was -- he was in the hole before he released the product.

But it's actually worse than what I thought because the evidence was that he found out about this hole after he released the product. He made the decision to release the W-5 in early July of 2015. And it wasn't until later that

month that he learned that he'd lost that contract and $7 million.

And then just two months later, he got sued. He knew that G -- that Whirlpool was accusing him of infringement, and what did he do? He kept on digging. He's proceeded for the year-and-a-half selling these products. That's why we ask -- we ask you to find that he's willful -- or TST is willful.

Damages. You've seen this slide. We know that Whirlpool sales plummeted after the W-5 entered the market. We're seeking to recover lost profits and reasonable royalties. And this lost profits evidence was virtually unrefuted.

The first three factors of that four-factor test that are in your instructions, you can read them. Two of them are stipulated to.

The first one was agreed to by Mr. Hanson, the Defendant's expert. He admitted that there was demand for the product.

So the only one we're down to is whether or not we can prove to you with reasonable certainty that these - these sales were due to infringement, the loss of these sales.

Mr. White took the stand, and he talked to you about these forecasts, how Whirlpool relies upon them. He talked to you about how he went back after the fact and

compared actual sales to the forecasts and determined that the actual sales were actually higher than the forecast.

But Mr. McFarlane relied upon the forecasted sales. He compared them to the actual sales. And we know -- we don't have to prove with unerring precision. I think that's what's -- His Honor just instructed to you. It's permissible to approximate.

But we have a really good idea because we have those forecasts, forecasts that Mr. Hanson put his blinders on and said, oh, they're not reliable, even though he didn't bother to come and listen to Mr. White or even read his testimony while sitting in his hotel room waiting to come testify all week.

Only Whirlpool bothered to do that calculation. The amount of the profit is undisputed. The amount of the total sales is undisputed. The only dispute is whether or not those sales were due to the entry of W-5. We've proven that to you. It's $2.5 million on those sales.

We also seek to recover reasonable royalties on these other units. Again, undisputed that these are TST sales. What is in pink is undisputed.

We brought Mr. McFarlane to you, and he did a reasonable royalty analysis. Remember, we're starting the day before TST enters the market. He looked at Whirlpool's profit and TST's profit, and he took you through a lengthy

analysis of how he got to his reasonable royalty calculation, because remember, on the eve of infringement, when you've got to go back and figure out what these parties would have agreed to in this hypothetical negotiation, TST had control over what it was going to price its product at, because we all agree -- we know that Whirlpool's never licensed this patent, right? We know that.

We know what TST's profit margin is. Neither one of them wants to agree to these things a year-and-a-half after the fact. TST says, oh, well, we've -- we've only been making a profit of $4.

THE COURT: 18 minutes have been used.

MR. WARD: Thank you, Your Honor.

But what did they know on the eve of this hypothetical negotiation? And how did Mr. Hanson try to convince you that this is reasonable?

He said: Looks let's at the KX MOU. We learned that it's not a license. Whirlpool was not a party. It was TST that was licensing a patent on a design-around.

We learned that that was their business, defeating patents on leak detection technology, 20 cents per filter.

He said: That's where we're going to start, at the low end.

Then he said: I'm going to use the Whirlpool/Proctor & Gamble agreement, the partnership that

has lasted up -- at 14 years at the time of this hypothetical negotiation.

He's going to look at an eight-year-old agreement between these two companies that Mr. Hanson admitted was very complex; that there was lots of things going on between these -- these companies when they came to this agreement; that if they ever broke up, P&G could have the license to the '894 for $2 a unit.

Reminds me of two buddies develop a piece of property. They spend 15 years developing it. They build a fence around it for the whole world to see. They build a nice lodge on it, maybe some lakes. It's a good partnership, and they have an agreement that if one of them leaves, the other -- the other partner can come back and rent it for, say, $500 a week. They've worked hard together. They're on good -- good terms.

A squatter comes, cuts the fence, builds a house on the property, lives there for a year-and-a-half. They end up suing him to kick him off the property. They have to take him to court. They get him in front of the jury.

What does the squatter say? Well, the squatter would say the cap on the most that I owe for cutting your fence and coming on your property is half of what you -- you two buddies agreed to back eight years ago when y'all were developing this property.

That's what TST says is a cap. A cap, what P&G and Whirlpool agreed to when they were jointly developing the '894 patent.

That's simply not reasonable.

That's why we ask you to disregard that testimony, award lost profits of 2.5 million, royalties of 6.2 million, and total damages of 8.7 million.

I'm going to have a few minutes to talk to you after Mr. Sganga, and I look forward to responding to some of his arguments.

THE COURT: All right. Defendant may now address the jury.

Mr. Sganga, would you like a warning on your time?

MR. SGANGA: Thank you. I would, Your Honor, at two minutes, please.

THE COURT: All right. You may proceed when you're ready.

MR. SGANGA: Thank you.

Good morning, Ladies and Gentlemen. On behalf of Michael Baird, TST Water, all of its employees, and my entire trial team, I really want to just take the time now to thank you for all your time this week, all your attention to this case. And, as you know, it is a very important case to Mr. Baird and TST Water.

It's been quite a journey for TST to get to this

courtroom so that it could have a chance to shine a light on Whirlpool's practices. We believe that when you consider all of the evidence, you should find for TST.

You're the first people to hear the full story. You've got all the information in front of you about how Whirlpool got its patent and all of TST's good-faith efforts to avoid the patent.

You heard from witnesses that the Patent Office never heard from. You've been pointed to prior art filter designs that the Patent Office hadn't focused on.

You're the first to evaluate all of the changes that Mr. Baird made in his W-5 design, and you're the first to compare those changes to the words in the Whirlpool patent claims that Whirlpool shows, claims that announced to the public where Whirlpool's property lines were drawn.

These are lines that they want to redraw now to block fair and legitimate competition from TST.

You heard about all those other lawsuits that Whirlpool filed; but none were presented to a jury like you to weigh all the facts, apply the law that the Court just instructed you on, and come to a fair decision about TST's design.

I'm going to talk about some of the evidence that you heard this week, but I'm also going to point out some of the things that you didn't hear, gaps in Whirlpool's

evidence, things they didn't show you.

First, I'm going to start with Michael Baird, who you know who has worked very hard to build a solid, respectable company. They're proud to sell their quality products that are made here in the USA.

And TST Water delivers on Mr. Baird's passion and pledge to bring high-quality water filters at a reasonable price to consumers.

Mr. Baird is a firm believer that everyone should be afforded the opportunity to buy filtered water that they can afford. And you know now from the evidence that TST Water makes a profit of about $4 per cartridge, but Whirlpool makes over $17 per profit in each cartridge.

That's a huge difference when you consider the fact that Whirlpool moved production overseas to save costs. That's just a different approach and philosophy to business.

Whirlpool talks about the customer brand experience, but the evidence showed is that what they really wanted to do was lock the customers in and keep their filter prices high.

Whirlpool justifies this by saying it didn't make -- make enough money selling its refrigerators in the first place.

That's a little like a car dealer saying to you, well, you know, you drove a real hard bargain when you bought

that new car or truck from us, and now we're going to make up for it by forcing you to come back to the dealership every time you want to change the oil, use an OEM oil filter every time.

And you -- you can't change the oil yourself. You can't use your own FRAM oil filter if you wanted to have a choice to do something other than buy an OEM filter.

Now, there's nothing wrong with FRAM selling oil filters for cars and trucks built by other OEM manufacturers. That doesn't make them a free rider. TST is not a free rider.

And what -- what makes it even worse here in this situation is that Whirlpool doesn't even tell consumers when they buy the refrigerators that they are going to get locked in. You haven't heard a single Whirlpool witness deny that. They can't.

Here's an exhibit that they explain about what happens when they have a patent. Well, they like it because that means they've got a captive audience. Consumers have no choice.

TST does really the opposite here. It's pro consumer. It offers high-quality products for reasonable pricing. TST is willing to let the consumers vote with their dollars for themselves.

If Whirlpool's got a higher-quality product that

reduces more contaminants or you feel more confident in that brand name, well, you can make that choice to spend the extra money on that, but let's -- let's compete fairly, let's compete evenly.

Now, I'm going to walk through the evidence that demonstrates that -- demonstrates that Whirlpool's failed to prove that TST infringes the patent. I'm also going to walk through the clear and convincing evidence that the Patent Office made a mistake and that the patent is invalid for obviousness.

Now, that's the same mistake that I pointed out in my opening statement, a mistake that Mr. Matt Stein testified about yesterday, a mistake that Whirlpool has never responded to and never explained. And maybe that's because after all these five days of trial, the evidence has just been pouring in about this case really being about Whirlpool blocking competition, preventing consumers from choice, and preventing the marketplace from driving prices to their naturally reduced level.

And we all know that when you've got competition, that's a good thing. Prices come down, airline tickets, cell phones, flat screen TVs, all of that -- even appliances, all of that is good for consumers.

Whirlpool wants to block it. You heard Mr. McFarlane admit that the only way that TST could afford to

pay his high proposed royalty rate was for TST to raise its prices.

Now, that's bad enough on its own; but on top of that, Whirlpool admits that TST is making sales Whirlpool would never make. Three out of four of TST sales Whirlpool doesn't claim that they make them.

So the impact of higher prices would be that 75 percent of the consumers, the people that buy the TST brand, would be priced out of the market if Whirlpool were allowed to block TST. Those consumers would lose their choice of a well quality -- of a high-quality, low-price filter, and that would not be fair.

Whirlpool calls it controlling the brand experience. Looks to me like Whirlpool wants to control its customers' wallets.

I want to talk a little bit about TST. You heard evidence about how they got founded. You had a chance to meet personally Mr. Michael Baird, Mr. Chuck Lacy, and Mr. Shannon Murphy.

You know all of those gentlemen are very passionate individuals, very hard working, very committed to their retail customers and to the ultimate consumers.

And one of the great thing about this jury system that you're getting to participate in is that -- that witness stand right there. You, as jurors, got the opportunity to

see the truth from that stand.

Now, for a witness to sit there and endure cross-examination, it's a pretty difficult thing, especially with a talented lawyer like -- like Mr. Ward. I -- I wouldn't want to get cross-examined by him myself.

But you saw each of the TST Water witnesses take the stand, swear an oath, and each one withstood cross-examination, they held to their convictions and beliefs.

As I said in the opening, TST was a classic American success story, and you've seen the evidence that backs that up.

Mr. Baird worked hard to make his company a success. In the beginning, TST struggled, but Mr. Baird never gave up. He sacrificed financially. He took risks, but he never gave up. It was his strong work ethics, his business values, and commitment to customers that ultimately made his company the success it is today and earned him national retail customers like Home Depot, Lowe's, Ace Hardware.

He has now over a hundred employees that are committed to that same mission, which is a customer's first approach. The company shows it with its quality products, its prices, its rigorous testing of its products, its hundred percent delivery rate to customers, its money back guarantee,

and its customer service.

And you -- you can tell the quality of Mr. Baird by the people that work for him that came here, took that witness stand, and told their story.

Now, did you notice that Mr. Baird was the only person who really testified about how his design, how his invention was created? He walked you through the entire process, step by step, iteration by iteration, sketch by sketch.

Now, he didn't say that some other company came up with that idea, or he couldn't really be sure what improvements he made or why, he didn't throw away his lab notebook.

Remember what Whirlpool's inventor, Todd Rose, said when he testified? Yeah, there's a policy, discard the notebooks when the project's finished. You know, all the non-pertinent data, that's what you do, you throw it away. So nothing on the Filter 3 project was pertinent by the time he got done with it.

But Mr. Baird saved every scrap of paper that showed his -- his process to develop the W-5 product. That's what -- that's what inventors do. They don't throw away records of their creative products.

He explained, Mr. Baird did, not only what he was thinking about but how he came up with his ideas. He

expressed to you how he was committed to respecting Whirlpool's patent and how he worked hard over three years to ensure that he did not infringe the patent.

He wasn't looking for a fast buck that he could have made years earlier when he first started on the product. Instead, he was honoring his business values, his ethics. He wouldn't put out a product that he thought would infringe on the Whirlpool patent.

He's a man with integrity and a man that respects the patents of others the same way that he would expect others to respect his own patents. And, frankly, I think he's a man of courage who was willing to stand up to Whirlpool and fight for what he believes was right.

Now, Whirlpool wants you to think that creating generic products somehow isn't an honorable business, but they're wrong. Not everyone can afford brand names, especially when they're double the price of the generics.

TST offers a solution for those who can't afford to spend $50 for a Whirlpool filter every six months.

But Whirlpool's witnesses say they've got no plans to lower prices. Whirlpool knows that generics are entitled to work around patents. Whirlpool employees are talking about it all the time.

Mr. Dibkey testified here, and he recognized that workarounds are possibly. And when that happens, if it's a

successful workaround, then Whirlpool has no infringement case.

Whirlpool had internal documents listing how many different patent workarounds existed for some of their filters.

The inventor, Mr. Mitchell, who testified by videotape, he admitted there were workarounds specifically -- it was possible to design around the '894 patent, and that someone experienced in designing filters would be able to do it.

And when the W-5 product was launched under the HDX brand at Home Depot, Jennifer Bonuso of Whirlpool writes to her boss, Mr. Dibkey, and says, oh, you better add a bullet point in that presentation, that -- that TST product, that HDX product appears to be a workaround.

And the reality is, is workarounds are a fact of life for Whirlpool. And, frankly, it's good for healthy competition.

Now, another piece of Whirlpool's brand experience story is that they're the only ones who can do a good job of controlling the quality of their products. And they said they would never license their patent to anyone else as a result, couldn't trust them on their quality.

But their own engineer, Mr. Guo, he testified by deposition, he was pretty candid when he was asked about

quality issues. Is it a challenge? Well, he says: Quality issues happen on every product.

And Whirlpool's engineer Beth Jackson talked about a whole list of different kinds of complaints. You know, there's complaints that the filters get stuck and that there's leaks and it tastes bad sometimes.

But, you know, this -- this isn't about whether Whirlpool or TST has the most absolutely trouble-free product. The point is that anyone making as many filters as these parties are doing, they're -- they're going to occasionally have some returns or complaints or problems.

But, you know, if we were taking an exam on how good our quality is, both of us would be getting As, maybe even A pluses, right? We're talking about 97 percent, 98 percent of the product at Home Depot that does not get returned, that has satisfied customers.

My point is that Whirlpool can't claim that their quality is so superior to TST's that it justifies blocking competition.

Now, let's talk about what happened at the Patent Office that allowed Whirlpool to get its patent in the first place. Remember, there were these -- these hundreds of patents that were cited at the Patent Office that the examiner was faced with. Each one of these little images is a patent here.

Now, the examiner thought that Whirlpool had done something different and found a little crack in between those old patents that Whirlpool could -- could plant a flag on and say you're different than the prior art.

And -- and here's how it happened. Mr. Stein explained it yesterday. That other company, Swift Green files the re-exam papers, and here's what they pointed the examiner to, Figure 9 of Fritze.

That's a patent we've been looking at. And they tell the Patent Office, Fritze's got the same kind of thing that Whirlpool claims. But Swift Green never points the Patent Office examiner to the good stuff. They point it to the wrong place.

On the left, Figure 9, that's what -- that's what Swift Green pointed to, but that doesn't have any cams that actuate a value.

On the right is Figure 5. We've highlighted in red that cam that we keep pointing to. And we know the examiner missed Figure 5, and maybe all three of them missed Figure 5 for sure, because we know when they wrote the paper explaining the reasons for allowing the -- the patent to issue.

Here's -- here's a quote. This is from the Patent Office. None of the alleged cam surfaces of the prior art includes any surface that physically touches a follower of a

valve for the purpose of actuating the valve.

We know this is wrong. We know it's a mistake because here it is in Fritze in the figure that Swift Green overlooked. Again, that -- that angled little red surface over here, that's the cam surface, and it's touching the follower, and it actuates a valve.

Now, the examiner is human. He made a mistake. That's understandable. But what's really surprising is that Whirlpool did nothing, not at the Patent Office. They never pointed out the mistake. They didn't do anything in this courtroom to explain away the mistake.

Mr. -- I pointed it out in my opening. Mr. Stein explained it yesterday in his -- in his direct examination. Whirlpool cross-examined him, but they didn't have any questions about the mistake.

Whirlpool had the chance to bring their technical expert, Dr. Beaman, back on the stand after Mr. Stein testified and explain why this wasn't a mistake. But they presented zero evidence to rebut this.

Instead, Whirlpool created a lot of confusion about how the patent is obvious.

Mr. Stein explained you basically start with this Knuth patent, and, oh, Whirlpool loves to talk about the backhoes and the hydraulics. Well, take a look at the actual words in the Whirlpool claim. It doesn't even say water

filter. It doesn't say refrigerator. It's just one of these fluid filters. So it counts as far as the claims are concerned.

And if you combine the Knuth patent, which has a cartridge, inlets, outlets, protrusions, bypass valves, and you can combine it with any one of these other patents in this other column, Fritze, Dorfman, the Japanese patent -- put them together, you're going to end up with everything that's claimed as the actual wording of the Whirlpool claims.

And it would have been obvious to do this, to combine with these other patents to get the results of bypass valves, protrusions, inlets, outlets, cams.

And what Whirlpool wants to do, though, is they do point to some other details. They've got some little details in some of the claims about, well, we positioned the inlet and the outlet and the -- and the protrusion on the corners of the triangle, and they're about 2 centimeters apart.

But this is just a simple design choice. Engineers are faced with issues about picking dimensions every day.

Even Dr. Beaman was asked to explain the slide, and he said 2 centimeters is an arbitrary number. No one has any -- from Whirlpool has ever come in and told you why 2 centimeters is better than 3 centimeters or 4 centimeters or 1 centimeter, any other one.

Instead, the inventor, Donald Bretl said -- when we

asked him: Anything about the design that you thought was special? Good?

Answer: Special? No.

That doesn't sound like an advance in the art. That doesn't sound like a true invention.

Now, Mr. Ward asked about motivation. What's the motivation to make these changes? Well, there's only a limited number of choices available.

If you're a person of skill in the art and you're trying to decide which way should my valves point at the back end of the cartridge -- cartridge goes in. I've got valves.

Should I put them in line, point them out the back so my hoses come out the back? Oh, I could put them at a 90-degree angle. Flip a coin. That's your choice. Engineers make those decisions every day. That's not an invention.

And it's not an invention to pick a shape for your cartridge and then say, oh, well, that's -- has the same matching shape in the head assembly in the refrigerator. It's easy to shape a key when you're making up the lock for that key at the very same time. It's all they were doing is making a key to fit their lock. Mr. Rose even said so when he was talking about the triangular shape.

Why did they do it? Well, we came up with an uneven triangle to give us a way to make sure that you would

get the filter to lock in the product the same way every time.

And he was being asked: What was that keying effect you were talking about?

Well, a key and a lock.

And it's not a breakthrough design to design a filter that fits in their refrigerator. This is really what we're talking about. The filter fits. The key fits the lock. You don't have to be an experienced engineer designing water filters to know how to make shapes fit.

Now, we've been looking at how small the changes are that Whirlpool made that differentiate itself from the prior patents.

Now, let's -- let's look at non-infringement and how big the changes were that Mr. Baird made to differentiate the TST product from Whirlpool.

And the Judge just instructed you that the proper analysis is look at the claims, look at the words of the claims, not -- not comparing products side-by-side. And that's what Whirlpool wants to do. They just want to look at the products and say, hey, they both fit.

Claims never call for a filter cartridge that's just compatible or that just fits in the housing. They didn't word it to say that it's the idea of just anything that fits in a Filter 3.

In fact, if you look closely at those claims, the word "fit" is not even in the claim. Whirlpool has never showed you where it is in the claim because they can't.

Instead, Whirlpool chose very specific words about the longitudinal axis of the fittings, specific words about where the protrusion is located, and how it extends from the end wall.

So let's look at those exact terms here.

Here's the -- the fittings having a longitudinal axis. This is right out of the claim. And we know this term has been defined by the Court. Same definition is in the language of the patent. Longitudinal axis refers to the axis.

It has -- it does two things. It runs along the length and to -- through the center. And when you look at that, the only way that that can happen is if the fitting is straight along its whole length.

The TST design isn't straight. We don't literally infringe. And the axis for the base of the filter only goes so far. It has to stop here.

Why? Because it's no longer at the center. The red and the green don't match up. The bent tip is off center, and it's bent.

So it's not literally infringing. You heard about how it works differently because we've got the wider opening

that doesn't get blocked, we've got the -- the wall that can act as a -- a wedge to chisel away ice.

And the result is that the customers see this W-5 product, and it's so different looking from the Whirlpool product, that customers get confused and they think they got the wrong part for their Filter 3 refrigerator.

So Whirlpool hasn't proven Doctrine of Equivalents infringement.

Let's talk about the protrusion extending from the end wall. Here's the language from the claim. The protrusion must extend from the end wall. Instead of doing that, TST spaced its protrusion far from the end wall. Never touches.

Whirlpool now says that the -- this -- this bridge supporting the protrusion indirectly extends from the end wall. Well, "indirectly" isn't in the claims. And it's too late for them to rewrite the claims.

Their arguments really kind of go a little too far and would make everything on the cartridge extend from the end piece wall.

Mr. Ward talked about Dr. Beaman and us questioning him on cross-exam, but here's what I remember about the questioning of -- of Dr. Beaman.

When Mr. Murray pointed to the other end of the cartridge and said, look -- look at this end cap here, you

know, is -- does this end cap at the opposite end, could this be considered extending from the end wall that the patent's talking about?

And he agreed. He agreed. And if that's true, you know, this -- this claim language about extending from the end wall is -- is basically meaningless. That's just Whirlpool trying to redraw its property lines, trying to rewrite the claims, trying to erase the words that they put in the claim that they chose that they needed to get that patent issued in the first place.

Now, let's look at what they did at the Patent Office again. They're -- they're in a crowded field. There's hundreds and hundreds of these patents that the Patent Office is considering.

And what they did is they wrote in that "extending from the end piece" language. That's how they found their little crack between all of these prior art patents to plant their flag.

Some of these patents had protrusions that actuated the bypass valve. And you've seen Knuth. You know, it gives you an example here. Let me just go back for one -- one moment here.

What Whirlpool did is it picked a place right in between -- you know, it found a little -- a little space between all of these patents and -- and described what it had

and said, okay, well, that's -- that's what we're going to do. We're going to say exactly where the protrusion is located. That's how we're going to determine, which is our property in -- in the middle of all of this crowded stuff. It shows the language. That was them laying out their property lines.

And for context, I want to look at some of the patents that had protrusions for bypass valves that were in front of the Patent Office.

And you saw Knuth. That's got the protrusion that presses against the end wall. Comes down from the top and presses against it.

You saw Fritze. That's got this protrusion we highlighted that goes alongside the end piece wall. And for context, in addition, here's another protrusion that starts inside the cartridge and goes through the end wall.

And you look at all this, that's why it's so important that the claim says extending from the end wall.

Whirlpool chose those words to draw its property line. And in light of this crowded field and the specific words that Whirlpool chose, the changes that TST made to the location of the protrusion are very significant.

Now, Whirlpool wants to say the patent still covers what TST did under Doctrine of Equivalents.

Now, you heard both Mr. Stein and Mr. Baird explain

how the lateral support, that V-shaped bridge, in the TST product works in a different way. Supports the protrusion more sturdily.

And when we really look at what Whirlpool is trying to do, is they're using the Doctrine of Equivalents to expand their -- their claim, to state your claim on property that they don't own, property that belongs in the public domain.

And a little bit like public -- if you had a public park, right, and someone comes along and just builds a fence around a part of that park and says, well, now it's my private property. That's a land grab. You can stop it. And you can stop it here in this case. It's Whirlpool redrawing its property lines.

The other way they try to do that is they say now that the idea of fit is the invention. It's too late for Whirlpool to do it now. It's unfair. A patent is a public document. TST was entitled to rely on the written claims in that patent and those property lines.

That's what Mr. Baird did. He looked at the written claims when he designed his filter. They didn't say just anything that fit. If they did, he wouldn't have bothered spending all those years designing and redesigning.

Whirlpool gave public notice of its property line in the patent. And you saw that video about the patent process. That's what the patent is all about.

Once a patent is issued by the government, it becomes available for inspection. That way anyone who learns of the patent can read it, understand it, and know exactly what the inventor invented, and the limits of the patent set forth in the claim.

That is what Mike Baird did. He read the patent, he understood the limits, and he made sure he stayed outside the limits.

THE COURT: Two minutes remaining.

MR. SGANGA: Thank you, Your Honor.

Mr. Baird's not an infringer. He deserves to keep competing fairly.

I want to just touch on damages briefly. Whirlpool was supposed to propose a reasonable royalty rate. Their high numbers just show how far from reasonable they are.

They use their high prices to get a profit margin that's high. They don't even tell its customers when it sells the refrigerator that they're locked in for life with Whirlpool.

And what was really surprising to me is that Mr. McFarlane, their damages expert, said they were raising their prices in 2015 before TST entered the market. The market's declining for them, sales are dropping down continuously before TST, and they're raising prices.

And so if that's -- you know -- and they're getting

consumer studies that say high prices are the biggest problem, lower your practices. This is -- this is the way to handle a brand experience.

Well, remember what they thought when they got into the market. They thought that the patent would give them a guaranteed annuity. Mr. Kroonblawd said that's a regular payout. Basically, they're trying to turn their refrigerators into cash machines. And they don't bother telling the customers about it.

Now, Mr. Baird was not willful, he was mindful of the patent. He was careful.

We're going -- I'm going to go through the verdict form real quickly here. We think you should answer no on infringement. Those limitations, the -- the longitudinal axis, the protrusion, if you find anyone -- either of those missing, none of the claims are infringed. And that's a win for TST.

It's also a win for TST if you find the patent invalid for obviousness. Either way, it's a win for TST. And if you look at all of the evidence, we think you can go for TST on both of those. But what's clear is Mr. Baird wasn't willful. He was respectful.

THE COURT: Your time is up, Counsel. Take a few seconds and finish.

MR. SGANGA: Thank you, Your Honor.

I want to be -- just say in conclusion that I -- I'm thankful to all of you for your service on the jury. I'm sure you'll be careful, as Mr. Baird was, and consider all the evidence.

I'm sure you'll be mindful of the Judge's instructions on the law. And with all that information before you, I'm hopeful that you will do the right thing and vote for TST.

Thank you.

THE COURT: All right. Plaintiff may now present its final closing argument. You have 9 minutes and 30 seconds remaining, Mr. Ward. Would you like a warning on your time?

MR. WARD: Two-minute warning, please, sir.

THE COURT: All right. You may proceed when you're ready.

MR. WARD: I certainly don't have time to respond to everything, but I can respond to a couple of things.

First, it was interesting to hear that Mr. Baird came up with this on his own when we know he studied the patent for four years, he bought 150 Filter 3s and studied them. He superimposed it on his own design drawings, and we saw those design drawings, how he melted -- melted away.

I'll respond to Mr. Sganga's comment about what happened at the Patent Office. We didn't call Mr. Beaman

back because I couldn't believe what you all saw for a case of invalidity because we all got to evaluate Mr. Stein, but I invite you to look at Defendant's Exhibit 100.

Could you pull that up, Mr. Lee?

On Page 3535 -- this is in evidence, DX-100. The examiner states why this patent is being confirmed valid. As to Claim 1, the overall claimed combination of an end piece for operatively engaging -- and it goes on for the rest of the page -- and he says: Is neither anticipated nor rendered obvious by the prior art of record.

Over all claimed combination, it's all -- combining all these elements. It's not picking one thing and saying, oh, I found it in a backhoe patent.

May I have the document camera?

Found it in a backhoe patent, combined it with a beer keg and wall valve. That's what they say invalidates the '894.

He wants to show you the -- the slide with the oil filter on it. You go to an auto parts store, and you see lots of oil filters all lined up on the shelves, and they all look alike. There's only one of these -- there's only one Filter 3 that's the best selling filter on the market.

Did you see any evidence in this case of anything similar to this? Nothing. You saw a bunch of twist-in valve -- twist-in water filters.

What Whirlpool -- what Whirlpool came up with was new and unique.

TST wants you to believe that they -- that Whirlpool would go to this hypothetical negotiation, give a license to its patent on a product that it's making over $17 in profit, and it'd say, we'll take a dollar. That -- that's reasonable. You all set your price wherever you want to, undercut our prices as much as you want to, but we'll take a dollar.

Does that sound reasonable? No less than a reasonable royalty determined on the date just prior to TST entering the market.

Could I see the ATM slide?

They say that Whirlpool thinks they've got an ATM. Well, they do have an investment.

Can we just see the -- the refrigerator? This is an investment. And what do you have to do if you want to get money out of the ATM? You've got to invest. You got to put money in your account, right? And that's what Whirlpool has done. It's invested in this technology.

TST wants to sit outside the ATM with no investment and what generates that stream of income.

We haven't been knocking TST's quality. We've talked about general concerns about Whirlpool, but I don't think you ever heard me get up here and say, you all have got

a terrible product. No one can buy it. It's ruining people's equipment. We haven't -- we haven't made that allegation.

But this is about choices. This case is about choices. Whirlpool is a company that has chosen to innovate. It's chosen to invest up to a hundred million dollars in developing new lines of refrigerators.

Mr. Sganga talks about overseas production. You've heard about the manufacturing facilities that Whirlpool has here, the money that it invests in those facilities, the 15,000 manufacturing jobs that it has in the United States. And it's proud of that investment.

And in addition to investing in that product -- in those products, it invests in protecting it with intellectual property, and it makes no excuses about that. It patents its innovations.

TST makes choices, and we're not saying that consumers shouldn't have a choice of generic if there's not patents on the filters. In fact, you all learned that there's 20 filters that TST was selling before they started infringing on the '894, and Whirlpool left them alone.

They're free to do that. They're free to -- to manufacture products that aren't covered by patents or products where the patents had expired.

The Filter 3 patent, the '894, expires in six more

years. If they want to come into that market in six years, they can. But what they can't do is say, oh, we need -- we need to give choice. We need to cut the fence and get in there and undercut Whirlpool's profits.

His Honor's instructed you that you treat these companies the same. You treat them fairly. They're proud of their property rights. Whirlpool's proud of its property rights. But TST doesn't respect those property rights.

We ask you to return a verdict that finds all these -- these claims infringed, that holds the patents valid, that finds that TST is a willful infringer -- they're the ones who made this choice -- and award the full amount of damages that Whirlpool has asked for.

I appreciate your time, and we look forward to receiving your verdict.

THE COURT: That completes closing arguments for counsel for both of the parties in the case.

Ladies and Gentlemen, I have a few more final instructions that I need to give you before you begin your deliberations.

You must perform your duty as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties will expect that you will carefully and impartially consider all of the evidence, follow the law as I have given

it to you, and reach a just verdict, regardless of the consequences.

Answer the questions in the verdict form based on the facts as you find them to be, following the instructions that the Court has given you on the law. Do not decide who you think should win this case and then answer the questions accordingly.

Again, I remind you, your answers and your verdict in this case must be unanimous.

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stages in life. This is true in patent cases between corporations, partnerships, and individuals.

A patent owner is entitled to protect its patent rights under the U.S. Constitution. This includes bringing a suit in a United States District Court for money damages for infringement.

The law recognizes no distinction between types of parties. All corporations, all partnerships, all other organizations stand equal before the law, regardless of their side, regardless of who owns them, and they are to be treated as equals.

When you retire to the jury room to deliberate on your verdict, you'll each have a copy of these written jury

instructions to take with you.

If you desire, during your deliberations, to review any of the exhibits which the Court has admitted into evidence during the trial, you should advise me by written note delivered to the Court Security Officer. He will bring me your note, and then I will send you that exhibit or those exhibits.

Once you retire, you should select your foreperson and then conduct your deliberations.

If you recess during your deliberations, follow all the instructions that the Court has given you about your conduct during the trial.

After you have reached your verdict, your foreperson is to fill in the verdict form with your unanimous answers to those questions. You are not to reveal your answers until such time as you're discharged, unless otherwise directed by me, and you must never disclose to anyone, not even to me, your numerical division on any question.

Any notes that you've taken over the course of the trial are aids to your memory only. If your memory should differ from your notes, then you should rely on your memory and not your notes. The notes are not evidence.

And a juror who his not taken notes should not -- should rely on his or her own independent recollection of the

evidence and should not be unduly influenced by the notes of any other juror. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

If you want to communicate with me at any time during your deliberations, you should give a written message or a question to the Court Security Officer who will bring it to me. I'll then respond as promptly as possible, either in writing or by having you brought back into the courtroom where I can address you orally.

I will always first disclose to the attorneys in the case your question and my response before I answer your question.

After you have reached your verdict and I have discharged you from your duty as jurors, you need to understand that you are not required to talk with anyone about your service in this case.

By the same token, after I have discharged you from your duty as jurors, you are completely free to discuss your service as jurors in this case with anyone that you choose to. The choice is yours, Ladies and Gentlemen, and not alone.

You should understand the practice in this Court is that if you wish -- after you are discharged, if you wish to talk about your service as jurors with any of the attorneys

in the case -- and I can tell you they would be interested to hear from you -- it's up to you to initiate a conversation with them. They are not permitted to initiate a conversation with you.

Again, whether you discuss your jury service after the receipt of the verdict and you're discharged as jurors is your decision and your decision alone.

All right. I will now hand eight copies of these final jury instructions and one clean copy of the verdict form to the Court Security Officer to deliver to the jury in the jury room.

Ladies and Gentlemen of the Jury, you may now retire to the jury room to deliberate. We await your verdict.

COURT SECURITY OFFICER: All rise for the jury.

(Jury out.)

THE COURT: Counsel, so you will know, the Court has ordered the Clerk to provide lunch to the jury today. It's to be delivered at 11:30.

You are welcome, during their deliberations, to wait here in the courthouse -- in the courtroom.

If you choose to wait outside the courtroom at an area office or location, make sure that my staff has adequate cell phone numbers for lead counsel and local counsel so that we can contact you in the event we receive a note or a

verdict.

Pending either receipt of a note or a verdict from the jury, we stand in recess.

(Recess.)

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

Counsel, I've received a note from the jury. It reads as follows: May we see Filter 3 and W-5? Thank you, L. Jenice Childers.

That would be, by my recollection, Juror No. 5. She's executed it as the foreperson.

I'm going to identify this as Jury Note No. 1 by placing a 1 in the lower right-hand corner of the note, and I'll deliver the note to the Courtroom Deputy to be included in the papers of the file.

In response to the note, Counsel, I'm holding two of the actual filters, one identified as Plaintiff's Exhibit 447, and one identified as Plaintiff's Exhibit 496.

Is there agreement among the parties that these are the two items that the jury is requesting in the note, and is there any objection to me sending these in to the jury?

MR. WARD: Agreement from the Plaintiff and no objection.

MR. SGANGA: No objection, Your Honor. I just want

to clarify, is the -- on the exhibit numbers, was it Plaintiff's Exhibit 447?

THE COURT: If I'm reading it right, Mr. Sganga, that's what it says.

MR. SGANGA: Okay.

THE COURT: That would be on the HDX filter, and then Plaintiff's 496 on the Whirlpool 3 filter.

MR. SGANGA: Very good. That -- that is what they appear to be. We just wanted to make sure.

THE COURT: Now, the jury did not request the packaging that these filters came in, so I would assume we send it in just the naked filters without any packaging.

Does anyone disagree with that?

MR. SGANGA: No, Your Honor.

MR. WARD: No.

THE COURT: All right. Mr. Nance, if you'll come forward, I'll hand these two exhibits, Plaintiff's Exhibit 496 and Plaintiff's 447 to you to be handed to the jury.

And pending another note or verdict, we stand in recess.

(Recess.)

(Jury out.)

THE COURT: Be seated, please.

Counsel, the Court's received a second note from the jury. I'll read it to you.

Would like to see prototype model set, parentheses, 3D printed set, close parenthesis. Signed Jenice Childers.

Below that it says: Also head assembly and insertion tube.

And then she's put her initials below the second request.

I'll mark this note in the lower right-hand corner as No. 2 to identify it, and hand it to the Courtroom Deputy for inclusion in the papers of this case.

I'm open to suggestion as to exactly what the jury wants. Hopefully, we can identify that with clarity. I'm assuming the first item is that long board with the cream-colored various iterations of Filter 2 being on them.

Was that an exhibit, Counsel, or was that a demonstrative?

MR. SGANGA: No, those were each individually marked as a series of exhibits, and that was just the platform to carry them --

THE COURT: Okay. I remember the tags on them, Mr. Sganga. You're right. So that clearly is -- at least to me, that's what the first request is.

Anybody feel differently about that being the first request?

MR. WARD: No, I think that's right.

MR. SGANGA: Agreed, Your Honor.

THE COURT: Okay. Then it says also a head assembly and insertion tube. Do we have suggestions as to what might accurately respond to that request?

MR. HUNG: Your Honor, I think it's PX-190 -- 190, which is the tube, and then in the same bag are 190A and B, which are the valve assemblies taken out. We did use the valve assembly during the case. That was P-90 -- PX-190B. So I think it's PX-190.

MR. SGANGA: Well --

THE COURT: Let me ask this, where are these things? I don't see them in the courtroom.

MR. WARD: They're -- they're up here in boxes.

THE COURT: They're in front of me. All right. Let's --

MR. HUNG: So, Your Honor, here is a -- the full device, and we had separately marked -- I'm sorry, it's 490, PX-490B, which is the valve portion of it.

THE COURT: What about the tubes, Mr. Hung?

MR. HUNG: I think the tube -- I think this is the tube that they're referring to.

MR. SGANGA: Yeah, Your Honor, DX-4 is the assembled tube with the head assembly on the end of it. This one -- the one that Plaintiff's counsel just pointed to I think has been disassembled. So we could give them both and --

THE COURT: Where is DX-4?

MR. SGANGA: We also have that here, Your Honor.

THE COURT: All right. Let's all talk one at a time because we are on the record.

MS. KENNEDY: Your Honor, this is DX-4, and it's the assembled version of their PX --

MR. HUNG: 490.

MS. KENNEDY: -- 490.

THE COURT: All right. Well, it seems to me the assembled version would be simpler to send than the unassembled version.

MR. HUNG: The only reason why I'd encourage the unassembled version, Your Honor, is this is what we used to demonstrate whether it fits, because the tube is so long you can't actually fit it and see the engagement if it's assembled.

THE COURT: All right. Again, let me ask what about the hoses because they spec -- or tubes?

MR. SGANGA: I understood that request, Your Honor, to refer to the -- the -- this --

THE COURT: This.

MR. SGANGA: -- longer --

THE COURT: Okay.

MR. SGANGA: -- end of it as the -- as the tube.

THE COURT: All right. Can -- I agree now that you

mentioned that.

Can we pull out the board with the various models or tubes on it that was mentioned in the first request?

MR. MURRAY: Your Honor, we have the prototypes themselves. As for the board, I'm not sure where the board is.

THE COURT: Well, I'd like to take it in the same way they saw during the trial, if possible.

MR. SGANGA: We don't have that here in the courtroom, Your Honor. But we certainly could --

THE COURT: Is it next door?

MS. STONEMAN: It's 10 minutes away.

THE COURT: All right. Why don't you go get it, please?

MS. STONEMAN: Okay.

THE COURT: Let's do this, Counsel, just so we can kind of all know what we're talking about, let's take the items that were on the board that addressed the first request and let's line them out behind Mr. Hung on this ledge right here so that all they have to do is be placed on the board and carried into the jury room; and that way, I can get everybody's agreement on the record that what's there on the ledge is what should be carried on the board into the jury room.

Then with regard to the second request, I would

suggest that what Mr. Sganga has in his hands, as well as what Mr. Ward has in his hands both be sent in in response to the second request.

If there's objection to that, let me know?

MR. SGANGA: No, Your Honor.

THE COURT: That way they have the assembled tube with the head, and then they have the head separately.

Now, what are the numbers on what you're holding, Mr. Sganga?

MR. SGANGA: This is Exhibit DX-4. The other labels are deposition exhibit numbers.

THE COURT: All right. DX-4.

And then, Mr. Ward, what's the identification on the item you're holding?

MR. WARD: PX-490B.

THE COURT: All right. Unless there's any disagreement, and if there is, let me know. Hand both of those items to Mr. Nance, gentlemen, if you will.

Mr. Nance, those two things are going into the jury. Why don't you take those into the jury room and return, and then we'll address this -- tell them that the rest of it will be coming, and then come back, please, sir.

COURT SECURITY OFFICER: Yes, sir.

THE COURT: Ms. Andrews, are you clear on exactly the two exhibits that were taken into the jury room?

COURTROOM DEPUTY: Yes, yes.

THE COURT: Okay. Counsel, let's let you continue to work on those items. We're going to go off the record; and when both sides are satisfied that we have what addresses the jury's request, let me know, we'll go back on the record, and then identify those items clearly for the record before they're sent in.

We're off the record.

MR. SGANGA: Thank you, Your Honor.

(Recess.)

(Jury out.)

THE COURT: Let's go back on the record.

Counsel have jointly identified the various exhibits that together comprise an accurate response to the first portion of this second note from the jury.

Would you send in the prototype model set -- 3D printed set?

I think we have agreement from both Plaintiff and Defendant that those items that accurately respond to that request have been identified; and if so, Mr. Ward, you're the closest to it, why don't you read off those exhibit numbers for the record, please?

MR. WARD: DX-697.1, 697.2, 697.3, 697.7, 697.5, 697.6, and 697.4.

THE COURT: And those are all Defendant's Exhibits,

correct?

MR. WARD: Correct.

THE COURT: All right. Mr. Sganga, do you agree that that's an accurate reply to the request from the jury?

MR. SGANGA: I do, Your Honor.

THE COURT: All right. Then the only thing missing is the little nondescript flat piece of board that they were put on when they were shown to the jury.

MR. SGANGA: Correct.

THE COURT: I'm going to direct the Court Security Officer to wait until that little piece of board is returned by somebody's paralegal who went to get it, and then to place those exact exhibits in that order on that board and carry it into the jury.

COURT SECURITY OFFICER: Yes, sir.

THE COURT: All right. And with that, Counsel, is there anything else we need to cover before we recess?

MR. WARD: No, sir.

MR. SGANGA: No, Your Honor.

THE COURT: All right. The Court will consider that an effective and accurate response to the second jury note.

And with those instructions to the Court Security Officer, we stand in recess.

(Recess.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

All right. Counsel, I've received the following from the jury:

We have a verdict.

Signed by Ms. Childers as jury foreperson.

I'll hand this note to the Courtroom Deputy to be included in the papers of this case.

And let's bring in the jury, please.

COURT SECURITY OFFICER: All rise for the jury.

(Jury in.)

THE COURT: Please be seated.

Ms. Childers, I understand you're the foreperson of the jury; is that correct?

THE FOREPERSON: Yes, sir.

THE COURT: Has the jury reached a verdict?

THE FOREPERSON: Yes.

THE COURT: All right. In that case, I'll ask you to hand the signed and dated verdict form to the Court Security Officer who will bring it to me.

All right. Ladies and Gentlemen, I'm going to announce the verdict at this time. And I'm going to ask each of the members of the jury to listen very carefully as I do that, because after I have announced the verdict, I'm going to ask each of you if this is your verdict so that we can

confirm on the record that it's the unanimous decision of all eight members of the jury.

Turning to the verdict form itself, and Question 1 located on Page 2 thereof:

Did Whirlpool prove by a preponderance of the evidence that TST Water directly infringes the following claims of the '894 patent either literally or under the Doctrine of Equivalents?

Claim 1, the jury's answer is yes.

Claim 4, the jury's answer is yes.

Claim 10, yes.

Claim 15, yes.

Claim 17, yes.

Claim 20, yes.

And Claim 27, yes.

Turning to Question 2 on the verdict form found on Page 3 thereof, the question is:

Did TST Water prove by clear and convincing evidence that any of the asserted claims of the '894 patent are invalid as obvious over the prior art?

The jury's answers are as follows:

Claim 1, no.

Claim 4, no.

Claim 10, no.

Claim 15, no.

Claim 17, no.

Claim 20, no.

And Claim 27, no.

Turning to Question 3 on Page 4 of the verdict form:

Did Whirlpool prove by a preponderance of the evidence that any of the asserted claims of the '894 patent are willfully infringed by TST Water?

The answer from the jury to this question is yes.

Turning to Question 4 on Page 5 of the verdict form:

For the claims that you have found TST Water infringed, what sum of money do you find by a preponderance of the evidence would fairly and reasonably compensate Whirlpool for past acts of infringement up to and including today's date?

The jury's answer is $7,600,000. $7,600,000.

Turning to Page 6 of the verdict form, I find that the verdict form is dated today's date, March the 10th, 2017, and signed by Ms. Jenice Childers as jury foreperson.

Ladies and Gentlemen, let me poll you to make sure this verdict is the unanimous verdict of all eight members of the jury.

If this is your verdict as I have read it, would you please stand up at this time?

(Jury polled.)

THE COURT: Thank you, please have a seat.

Let the -- let the record reflect that upon the Court asking the jury whether this was their verdict, all eight members of the jury immediately stood in response confirming that this is the unanimous verdict of all eight members of the jury.

I'm going to hand the verdict form to the Courtroom Deputy to be included and filed in the papers of this cause.

Ladies and Gentlemen, this now completes the trial of this case. From the very beginning, I've instructed you not once, not twice, but many times about not discussing this case with anyone in any way, in any shape, or any fashion.

I'm now releasing you from that and all the obligations that you've undertaken as jurors in this case.

You're free to talk among yourselves. You're free to talk with anyone. You're now free to post on Facebook or tweet on Twitter or all those things I told you not to do when we started this process.

However, I want you to understand, to the extent you elect to communicate or -- or talk with anyone about your service in this case, it's strictly and completely up to you.

As I mentioned earlier, the lawyers are not permitted to come to you and initiate a conversation about the case. But I can tell you having practiced in this very

courtroom over a long period of time, don't be surprised if they're not positioned outside the courthouse so that when you leave, you will have to walk by them.

And if you want to talk with them, they will smile at you, and you can stop and talk as long as you want to.

And if you don't want to talk, just smile back and keep on walking. It is 100 percent your decision, your personal choice.

Either way, they won't initiate or anyone else won't initiate a conversation with you. It will be up to you to do that. You're free to do that now; you're also free to not to. It is completely your choice and your choice alone.

Also, Ladies and Gentlemen, on behalf of the Court as an institution, the Court staff, and I think fairly on behalf of the parties and the lawyers in this case and everyone in the courtroom, we want you to know that we appreciate very much and very deeply what you've done and how you've discharged your important public service as jurors in this case.

Every one of you had other places to be throughout this week that were important in your respective lives, and you've sacrificed those individual concerns and responsibilities to be here and to serve as the jury in this case.

And you have performed a very real and substantial

public service, and that is no small thing. As a matter of fact, that is a very important thing, and the Court recognizes it and thanks you for it, as does I think everyone in this courtroom.

I would like to mention to you that it's my practice, and I hope you will accommodate me in this regard, that after I've accepted a verdict in a case like this and discharged the jury, I ask the jury before they leave the courthouse to go back to the jury room for just a few minutes and let me come in, and I'd like to thank each one of you personally, I'd like to look you in the eye and shake your hand and tell you face-to-face how much I appreciate what you've done in serving as a juror in this case.

I think what you've done warrants that, and I'd like that honor and privilege if you would afford it to me.

If you care not to do that, you have been discharged and you're free to leave. But if you would accommodate me with a personal privilege in that regard, I would certainly appreciate it. And I promise, I won't keep you very long. But I would like the opportunity to thank you each in person for your hard work and public service in this case.

That completes the trial of this case, Counsel.

You are discharged and released.

Members of the jury, if you'll afford me that

privilege, I'll meet you in the jury room.

COURT SECURITY OFFICER: All rise for the jury.

(Jury out.)

THE COURT: Court stands in recess.

(Court adjourned.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of our abilities.

/s/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR March 10, 2017
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/18

/s/ Shea Sloan
SHEA SLOAN, CSR, RPR
Official Court Reporter
State of Texas No.: 3081
Expiration Date: 12/31/18